
2018 Report on the Effects of Changes to Tort Laws



South Carolina Department of Insurance
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

December 21, 2018



South Carolina Department of Insurance

HENRY McMASTER
Governor

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December 20, 2018

The Honorable Henry McMaster, Governor
State of South Carolina
State House
1100 Gervais Street
Columbia, South Carolina 29201

The Honorable Hugh K. Leatherman, Sr.
President *Pro Tempore*
South Carolina Senate
111 Gressette Building
Columbia, South Carolina 29201

The Honorable James H. Lucas
Speaker
South Carolina House of Representatives
506 Blatt Building
Columbia, South Carolina 29201

RE: 2018 Report on the Effects of Changes to Tort Laws

Dear Governor McMaster, President *Pro Tempore* Leatherman and Speaker Lucas:

Section 15 of South Carolina 2005 Act No. 32, the South Carolina Noneconomic Damage Awards Act of 2005, reads as follows:

As a majority of the health care community is insured through the South Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund and as it is essential for the General Assembly to understand the effects of changes to tort laws, the South Carolina Department of Insurance is given authority to request data regarding changes in claims practices from the South Carolina Medical Malpractice Joint Underwriting Association (JUA) and the Patients' Compensation Fund (PCF). Such data may include paid claims, paid loss adjustment expense, case reserves, bulk reserves, and claim counts by quarter for the previous five years. The department may make such a request of the South

Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund and such information must be provided within thirty days.

The Department of Insurance shall report annually to the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Governor as to whether this and other related enactments have resulted in reductions in premiums and as to any other trends of significance which might impact premium cost.

Pursuant to the above, the Department submitted requests to the South Carolina Medical Malpractice Joint Underwriting Association (JUA) and the South Carolina Medical Malpractice Patients' Compensation Fund (PCF) requesting any information relevant to the effects of tort reform. The responses from both entities are enclosed for your review.

Report Limitations

As noted in the responses from both the JUA and the PCF, it is difficult to assess the effects of tort reform for a variety of reasons which are highlighted below:

1. Claims Tail

The tort reform enacted in 2005 applies prospectively only, meaning that any claims that occurred prior to the effective date of July 1, 2005 are not affected by the reform. On average, claims with occurrence dates in a given year take over three years to be reported and over five years to settle. It is frequently the case that the more complicated and costly claims are also the longest to settle, remaining open for much longer than the average claim.

Claims under the occurrence coverage will be subjected to greater influence of tort reforms over claims-made coverage. One of South Carolina's top medical malpractice insurers surveyed in 2016 suggested that it will take time and substantial volume of closed claim data to begin to see the overall impact of tort reform on loss costs.

2. Various Factors Impacting the Marketplace

Even when more years of post-reform experience are available, measuring a given reform's impact is complicated by the difficulty in separating the effect of tort reform from variables such as inflation and other changes in the legal and social climate. For example, the consulting actuary for the PCF previously noted an industry wide decrease in medical malpractice loss trend, including in states that have not been subject to tort reform.

While they did expect this trend to impact the PCF, it would not be the result of tort reform. Further, the PCF continues to experience significant drops in exposure related to the elimination of unlimited coverage limits and decreases in membership. Finally, there may be a lag in implementation of reform related to uncertainty about whether the reform will ultimately be found to violate a state's laws and the length of time to resolve this uncertainty.

Tort Reform's Impact on Rates

It is worth noting there is typically a time lag between the enactment of tort reform and the data becoming available to assess its degree of effectiveness on claims and insurance rates. The current PCF rate analyses use experience that is subsequent to the tort reform. For this reason, PCF reports that the effects of tort reform are fully reflected in the PCF analysis.

1. South Carolina Medical Malpractice Joint Underwriting Association

The Joint Underwriting Association (JUA) writes coverage limits up to \$200,000 for each medical incident and \$600,000 annual aggregate (\$200K/\$600K). The JUA has not taken into consideration the impact of tort reform in their rates as their limit of liability is only \$200,000 and falls below the level of the cap on non-economic damages. The JUA had a slight rate increase in 2017 and again in 2018. Neither rate increase was related to tort reform.

2. South Carolina Medical Malpractice Patients' Compensation Fund

The Patients' Compensation Fund (PCF) was created to provide the option of an additional layer of coverage above the JUA's limits. The PCF currently offers limits ranging from \$1 million for each medical incident and \$3 million annual aggregate (\$1M/\$3M) to \$10 million for each medical incident and \$12 million annual aggregate (\$10M/\$12M).

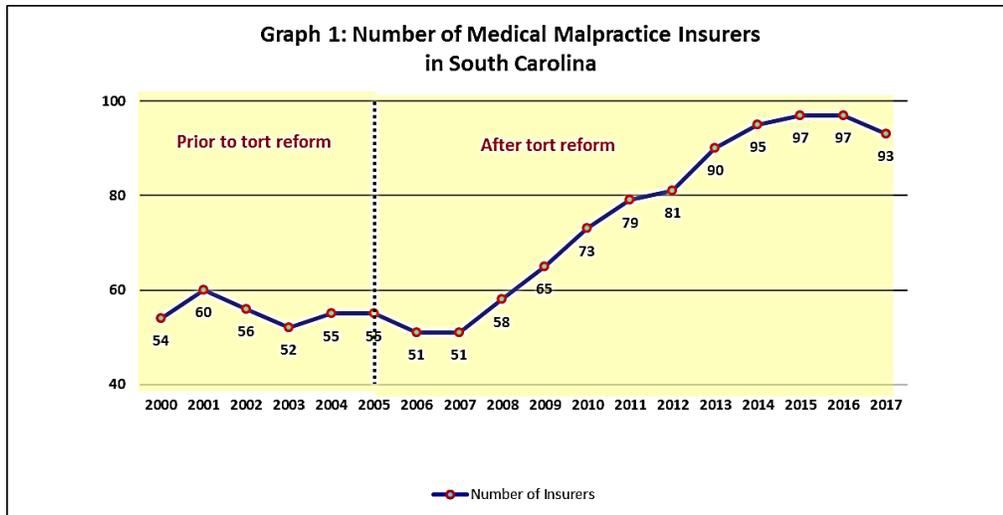
The PCF has lowered their rate levels since 2008 on three separate occasions as their overall experience has been favorable. In 2017, the PCF elected to change rates for some specialties which had the effect of a small overall rate reduction. This year, the PCF Board of Governors approved an overall increase in membership fees of 5% for all limits of coverage.

Overall Trends in the Marketplace

1. Competitive Market

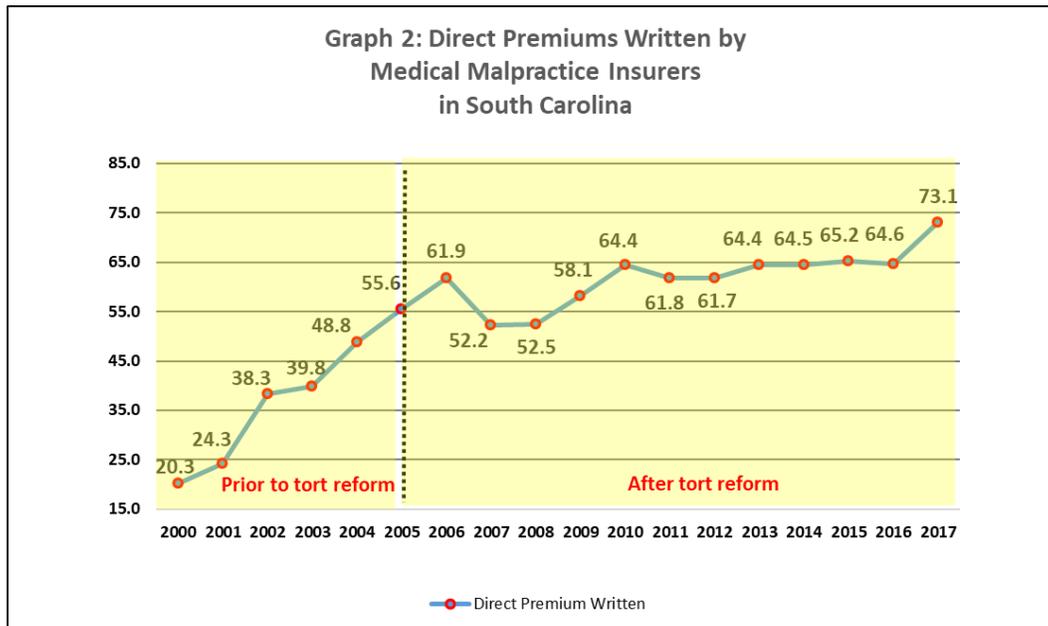
South Carolina's medical malpractice market is still highly competitive. Among U.S. states and territories, South Carolina ranked 35th in the ratio of physicians to population; it was 36th last year.¹

¹ Based on data from "Total Professionally Active Physicians", The Henry J. Kaiser Family Foundation, <http://kff.org/other/state-indicator/total-active-physicians/>, October 2018, accessed November 15, 2018, and "Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016," <https://www2.census.gov/programs-surveys/popest/tables/2010-2017/national/totals/na-est2017-01.xlsx>, accessed November 15, 2018.



Source: "Countrywide Summary of Medical Malpractice Liability Insurance Calendar Years 2003-2017" NAIC, (http://www.naic.org/documents/research_stats_medical_malpractice.pdf), Accessed: November 16, 2018

The NAIC data in Graph 1 illustrates that the number of medical malpractice insurers doing business in South Carolina has nearly doubled since the time of the reform, remaining at or above 90 for several years. The market remains quite competitive, and there do not appear to be any problems with availability.



Source: "Countrywide Summary of Medical Malpractice Liability Insurance Calendar Years 2003-2017" NAIC, (http://www.naic.org/documents/research_stats_medical_malpractice.pdf), Accessed: November 16, 2018

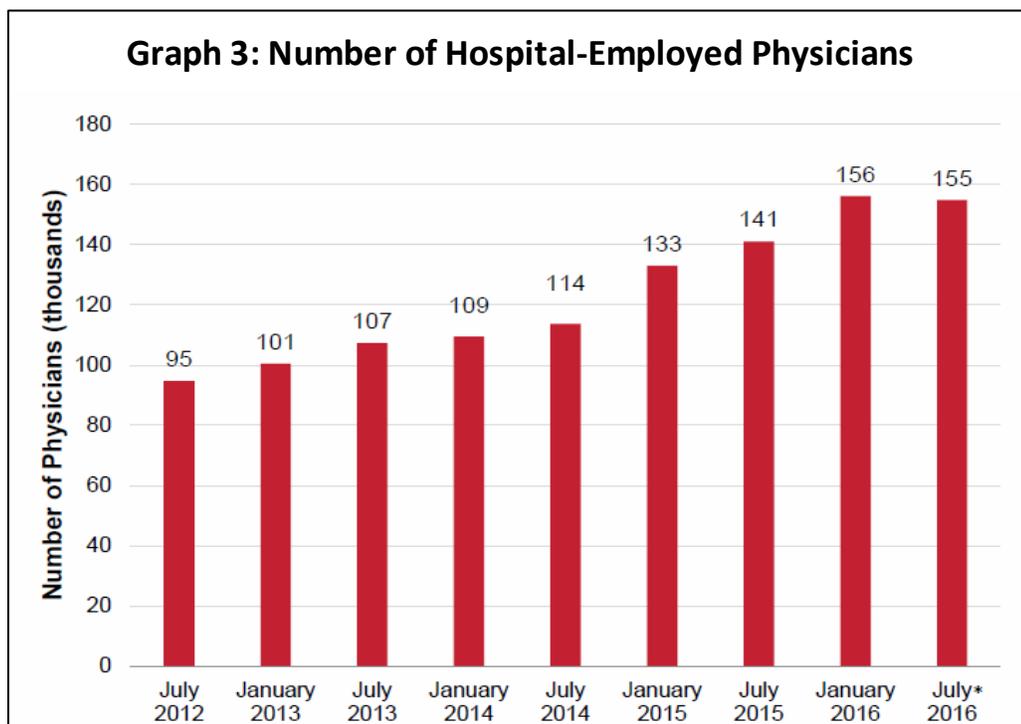
Graph 2 shows that direct premiums written remained relatively flat from 2010 and 2016 before growing by 13.1% in 2017, the largest increase in premium in ten years.

2. *Reduced Pool of Insureds*

While the state's number of insurers and amount of direct premium writings has remained steady over the past few years, the voluntary market has experienced a substantial decrease in the pool of potential insureds.

The JUA and PCF no longer insure most of South Carolina's physicians. In fact, both companies' exposures have decreased by more than 75% since tort reform was enacted as many of the previous exposures have become employed by hospitals with the rest moving to other writers in the market. A study completed by Accenture in 2016 indicated that the percentage of independent physicians was expected to decline to thirty-three (33%) percent by the end of 2016.²

The Physicians Advocacy Institute (PAI) found that from July 2012 to July 2016, the percentage of hospital-employed physicians increased by more than 63%. As shown in Graph 3, over 40,000 physicians shifted into employment models from July 2014 to July 2016.³



² "The (Independent) Doctor Will NOT See You Now" Accenture, (https://www.accenture.com/t20150608T044420_w_us-en/_acnmedia/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Dualpub_15/Accenture-The-Doctor-Will-Not-See-You.pdf), Accessed: November 14, 2017

³ "Updated Physician Practice Acquisition Study: National and Regional Changes in Physician Employment 2012-2016", PAI, (<http://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/2016-PAI-Physician-Employment-Study-Final.pdf>), Accessed: December 17, 2018.

3. *Rate Adequacy*

Rate adequacy is another gauge of the potential impact of tort reform over an extended period of time. In South Carolina, the market saw moderate rate increases following the enactment of tort reform, but as the adjustment period progressed, the market saw some rate level reductions.

In 2018 some of the largest writers of medical malpractice insurance submitted filings with single digit rate increases. It is possible for carriers to offset these base rate increases by the use of scheduled discounts and credits, but the Department does not have readily available data to verify whether or not that is occurring.

The combination of the aforementioned factors has led to a highly competitive market for medical malpractice insurance in South Carolina. Both the JUA and the PCF reported a more competitive market as likely being attributable, at least in part, to the passage of tort reform legislation. The Department concurs with this assessment. Therefore, it is reasonable to conclude that these reforms have contributed to the increase in competition in the marketplace.

Again, it is important to stress that it is difficult to determine a direct causal relationship between changes in the marketplace and the 2005 law, but it is reasonable to conclude that these reforms have at least partially contributed to the increase in competition in the marketplace.

Please do not hesitate to contact me if you have any questions or if my staff or I may provide you with any additional information. My staff and I are available to discuss any of the issues raised in this report with you at your convenience and to provide technical assistance to you and members of your staff as necessary.

Sincerely,



Raymond G. Farmer
Director of Insurance

Enclosures

Cc: The Honorable Ronnie Cromer, Chairman
Senate Banking and Insurance Committee

The Honorable William E. Sandifer III, Chairman
House Labor, Commerce and Industry Committee